OCT 10

No. 55

INDEX.

Subject Index.

	Page
Brief of appellants	1
Opinion of the court below	1
Jurisdiction	1
Statement of the case	2
The facts	4
Specification of errors	7
Argument	8
The California Statutes	11
Compulsory membership and service in the reserve officers training corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the 14th Amendment	14
Compulsory military training imposed upon religious and conscientious objectors violates religious freedom, and deprives appellants of their freedom of religion without due process of law	23
Compulsory military training violates the Kellogg Pact, outlawing war	25

Table of Cases Cited.

Arver v. U. S., 62 L. Ed. 349, 245 U. S. 363	19
Coale v. Pearson, 290 U. S. 597	2, 10
Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148	22
Hardwich v. Board of School Trustees, 54 Cal. App. 696	24
Home Ins. Co. of N. Y. v. Morse, 20 Wall. 445	21
Meyer v. Nebraska, 262 U. S. 390	24
Near v. Minn., 283 U. S. 697, 75 L. Ed. 1357	8
Pierce v. Society of Sisters, 268 U. S. 510	24
Riley, In re, 20 F. Cas. No. 11834, 1 Ben. 408, 39 How. Pr. (N. Y.) 188	16
Security Mut. L. Ins. Co. v. Prewett, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317	22
Stromberg v. California, 283 U. S. 359, 75 L. Ed. 1117	8
Terrall v. Burke Const. Co., 257 U. S. 529, 66 L. Ed. 352	4, 21
United States v. Cruikshank, 92 U. S. 542	20
United States v. McIntosh, 283 U. S. 605, 75 L. Ed. 1302	3

STATUTES CITED.

	Page
Act of April 22, 1898, 30 Stat. at L. 361, c. 187, sec. 1	16
Constitution of the State of California, Article VI, Sec. 2	8, 9, 12
Article IX, Sec. 9	7, 11, 13
Constitution of the United States, Article VI, Cl. 2	8, 9, 12
Constitution of the United States, 14th Amendment	7, 8, 12, 14, 18, 19, 23, 24
Kellogg Pact of 1928	8
Organic Act creating the University of California (Stats. 1868, p. 248, sec. 6)	12
Resolution or Order of the Regents of the University of Sept. 15, 1931	3
U. S. C. A. Title 10, Army, Chap. 20, Reserve Forces, Sec. 381 Establishment of Reserve Officers Training Corps	15

OTHER AUTHORITIES CITED.

5 Corpus Juris p. 297	16
36 Opinions of Attorney General 297	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 55

ALBERT W. HAMILTON, A MINOR, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, ET AL.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

BRIEF OF APPELLANTS.

Citation of Opinion of Court Below.

The opinion of the Supreme Court of California (R. 29-30) is reported in 87 Cal. Dec. 88.

Statement as to Jurisdiction on Appeal.

The statement as to jurisdiction on appeal is separately printed and on file with the clerk. We think it demonstrates that this Court has jurisdiction of this case on appeal. Certainly it does show that substantial Federal questions

were presented to the State court, and that the appeal was timely taken; that the judgment of the Supreme Court of California is final both in form and in substance and disposes of all of the elements of the controversy in the court below; that the judgment of the Supreme Court of California is that of the highest court in which, under the laws of the State, such judgment could be had, and that appellants contended in the court below that certain State statutes, as applied, were repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity.

If for any reason the Court should find it necessary to hold that appellants have mistaken their remedy and proceeded by appeal when they should have petitioned for certiorari, we think it is clear under the statutes and the rules of this Court that the case should be considered as if it had come up on certiorari, and dealt with on its merits.

The citation on appeal, issued by Mr. Justice Sutherland, after allowing the appeal, serves the purpose of a writ of certiorari and has brought the record of the Supreme Court of California to this Court.

For argument as to jurisdiction we respectfully refer the Court to the printed statement as to jurisdiction on appeal.

Statement of the Case.

Primarily the purpose of this appeal is to test the constitutionality of California statutes requiring compulsory military training of all able-bodied male students who are citizens of the United States, regardless of their conscientious and religious objections to war and military training, and their privileges and immunities as citizens of the United States.

Superficially this case is similar to *Coale* v. *Pearson,* in which this Court dismissed an appeal from the Maryland Court of Appeals in November, 1933.

Fundamentally the two cases are sharply distinguishable, as we shall show, and the *Coale* case is not in any sense a controlling precedent.

The California statutes, the validity of which is drawn into question, are (a) Section 9 of Article IX of the State Constitution, (b) the Organic Act creating the University of California (Stats. 1868, P. 248, Sec. 6), and (c) the Resolution or Order of the Regents of the University of September 15, 1931, requiring compulsory military training. Each of these statutes is discussed hereinafter.

The questions of law presented by this appeal have never been pased upon by this Court. *United States* v. *McIntosh*, 283 U. S. 605, 75 L. Ed. 1302, dealt with the question of religious liberty as applied to aliens seeking naturalization, but not as applied to native born citizens, as are the appellants herein. In the *McIntosh* case this Court held substantially that an alien seeking citizenship must promise under oath to bear arms in case of war in defense of the Constitution and of the United States. No such question is involved here. The question here is whether college students who are citizens of the United States and active members of the Methodist Episcopal Church and affiliated organizations, may be compelled to surrender their convictions of conscience and of religion and their privileges and immunities as citizens of the United States, or, for their refusal so to do, be denied education at the hands of their State University, to which they are in all other respects clearly and admittedly entitled.

May we at this point call to the attention of the Court the fact that there is no disputed question of fact in this case. Final judgment in the Supreme Court of California went against appellants before any answer, demurrer, or other appearance had been filed on behalf of respondents (appellees here). No pleading of any kind has been filed

at any time by the said respondents or any of them. So, under the familiar rule, all of the allegations of fact in the petition for mandate in the State court must be taken as true, and we are satisfied that counsel for appellees will agree to that statement of the law, and to the statement of fact that the allegations of the petition for writ of mandate are true. (*Terrall* v. *Burke Const. Co.*, 257 U. S. 529, 66 L. Ed. 352.)

The Facts.

Appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., were, in October, 1933, and until dismissed, as hereinafter related, students in good standing at the University of California at Los Angeles. The main seat of the University of California always has been, and now is, at Berkeley, California. Some years ago a branch of the University was established at Los Angeles. Later this "branch" became the "University of California at Los Angeles." Appellee Robert Gordon Sproul is president of the University of California. Appellee Ernest Carroll Moore is vice president of said University and provost of the University of California at Los Angeles. Both the student appellants are minors and they instituted this proceeding by their fathers and guardians *ad litem*, Albert Hamilton and W. Alonzo Reynolds. The two fathers also joined in the law suit as individuals, asserting their rights as citizens and taxpayers to demand the reinstatement of their sons as students.

Soon after the opening of the Fall Semester both boys petitioned the University authorities for exemption from military training upon the sole ground of their conscientious religious objections. Both boys being active members of the Methodist Episcopal Church, and both being sons and grandsons of Methodist ministers, they rested their claim

to exemption upon the official resolutions of the General Conference of the Methodist Episcopal Church held at Atlantic City, New Jersey, in 1932, and of the Southern California Conference at its sessions in 1931 and 1933. All of the said resolutions are set out in full in the petition for mandate (R. 3, 4).

The boys' petition for exemption from military training was denied. Thereafter, Bishop James C. Baker, of the San Francisco area of the Methodist Episcopal Church, and others, appeared before the Regents of the University at Berkeley and asked that courses in military training be made elective, and that Hamilton and Reynolds be exempted from the requirement of compulsory military training. On or about October 10, 1933, the Regents of the University by resolution refused to make military training optional, and refused to exempt appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., from compulsory military training at the University. Thereupon Hamilton and Reynolds respectfully declined to participate in military drill and were upon the exclusive ground of that refusal suspended by the vice president and provost, appellee Dr. Moore.

The primary object of establishing units of the Reserve Officers Training Corps at the University of California is in fact and as officially announced in the University's publications, to qualify students for appointment in the Officers Reserve Corps of the United States Army. The courses in military training are those prescribed by the War Department for Infantry Units of the Senior Division of the Reserve Officers Training Corps. The Regents of the University of California require enrollment and participation in said courses of military training for at least two academic years of all able-bodied male students who are citizens of the United States. Said courses include instruction in rifle marksmanship, scouting and patrolling, drill and

command, musketry, combat principles and use of automatic rifles. Arms, equipment and uniforms for use of students in such courses are furnished by the War Department of the United States Government (R. 2, 3).

As members of the Methodist Episcopal Church, all of the petitioners (appellants here) have accepted and do accept and feel themselves morally, religiously and conscientiously bound by the tenets and discipline of said Church, as expressed in the resolutions quoted in the petition for writ of mandate from the General Conference and the Southern California Conference of said Church; each of appellants is a follower of the teachings of Jesus Christ; each of them accepts as a guide to his life the teachings of Jesus and of the Bible and holds as a part of his religious and conscientious belief that war and training for war and military training are immoral and wrong and contrary to the letter and spirit of the teachings of Jesus and the precepts of the Christian religion (R. 5).

The University of California as a state institution affords education such as, and upon such terms as, are not to be had at any other educational institution in California except at greater cost, which appellants Albert W. Hamilton and W. Alonzo Reynolds, Jr. are not able to pay (R. 6).

Appellants were at all times ready, able and willing to take as a substitute for military training such other courses as might be prescribed by the University, which fact was known to appellees before the date of the order of suspension above mentioned (R. 7). After the suspension appellants petitioned for a writ of mandate to compel their reinstatement as students upon State and Federal Constitutional points. Judgment went against them. Their appeal rests entirely upon the Federal questions hereinafter discussed.

Specification of Errors.

The assignment of errors is set out in detail at pages 31 to 35, inclusive, of the Record. That assignment of errors was adopted by appellants as their statement of the points to be relied upon in the argument in this Court (R. 39).

Summarized, the errors assigned are that the court below erred in holding:

1. That (a) the Organic Law of the University of California (Stats. 1868, P. 248, Sec. 6); (b) Article IX, Sec. 9, of the Constitution of the State of California, and (c) the regulations of the Regents of the University of California, as applied, do not violate the rights of appellants under the due process clause of the 14th Amendment;

2. That those statutes, as applied, do not abridge the privileges and immunities of appellants as citizens of the United States in violation of the 14th Amendment;

3. That the same statutes as applied are not contrary to the treaty of the United States known as he Kellogg Pact of 1928;

4. That in suspending appellants from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps, the Regents of the University have not violated appellants' rights under Article VI, Clause 2, of the Constitution of the United States, and under the 14th Amendment thereof.

And that the court below erred in failing to hold:

(1) That each of the above named statutes as applied so as to authorize the suspension of appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps violated their rights under the due process clause of the 14th Amendment;

(2) That each of the above named statutes as applied abridges the privileges and immunities of appellants as citizens of the United States in violation of the 14th Amendment;

(3) That each of the above named statutes as applied is contrary to the Treaty of the United States known as the Kellogg Pact of 1928;

(4) That in suspending appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps, the Regents of the University have violated appellants' rights under Article VI, Clause 2 of the Constitution and under the 14th Amendment thereof.

And, finally, that the court particularly erred in refusing to grant a writ of mandate requiring the Regents to reinstate petitioners and appellants herein as students of the University of California.

ARGUMENT.

It is respectfully submitted that this case is important in that it affords opportunity to this Court to declare anew, and to protect and enforce, the American tradition and constitutional guaranty of freedom of religion, and the privileges and immunities of citizens of the United States as guaranteed by the 14th Amendment against abridgement by the States. We propose to show that, just as this Court protected against state aggression the principle of freedom of speech in *Stromberg* v. *California,* 283 U. S. 359, 75 L. Ed. 1117, and the principle of freedom of the press in *Near* v. *Minn.,* 283 U. S. 697, 75 L. Ed. 1357, it must now be held that another of the great fundamental civil liberties guaranteed to Americans by the 1st Amendment also is protected against state aggression by the due

process clause of the 14th Amendment. We are constrained to regard *Stromberg* v. *California,* and *Near* v. *Minnesota,* as landmarks in the history of our civil liberties under the Constitution. And we think it is clear that all of those liberties enumerated in the 1st Amendment are equally entitled to the vindication and protection of this Court.

Two young men, American born citizens of the United States, both sons and grandsons of Methodist ministers, and both devoted members of the Methodist Episcopal Church, have been suspended from their State University upon the sole and exclusive ground of their respectful refusal to surrender their deepest convictions of religion and conscience and submit to enforced military training for war. No other ground for their suspension has been suggested. No other ground we are confident will be urged by counsel for the appellees. None of the allegations of fact of the petition for writ of mandate filed in the Supreme Court of California as a court of original jurisdiction has been denied or challenged in any way. No demurrer, answer, or other pleading was filed in the lower court. The petition for mandate was filed on Friday, December 8, 1933, and the final judgment on the merits denying petitioners any and all relief was filed on the first business day thereafter, namely, Monday, December 11, 1933.

The Honorable Supreme Court of California seems to have rendered judgment for the defendants as if pursuant to an order sustaining a general demurrer without leave to amend. But there was no demurrer. Nor was there any statement in writing of the reasons of the Court for its decision, as required by the Constitution of California. Articles VI, Section 2, provides that "in the determination of causes, all decisions of the court, in bank or in department, shall be given in writing, and the grounds of the decision shall be stated."

Later, and on January 8, 1934, the Court denied a petition for rehearing and rendered in that connection a brief opinion (which is reported in 87 Cal. Dec. 88, and printed in full at pages 29 and 30 of the Record herein). In that opinion the Supreme Court of California, on page 3, said:

> "We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States. (*Pearson* v. *Coale et al.*, 167 Atl. (Md.) 54; 54 Sup. Ct. Rep. 131 (*Coale* v. *Pearson et al.*))" (R. 30).

Upon reading that opinion counsel for appellants learned for the first time that the California court relied upon the Maryland case in arriving at its decision. The opinion being rendered in support of an order denying a petition for rehearing, there was no opportunity to counsel to distinguish before that court between the Maryland case and the case now before the court. The cases are sharply distinguishable. This Court in November, 1933, dismissed the appeal of the student Coale from the decision of the Maryland Court of Appeals upon the ground that the appeal did not present a substantial Federal question. Our case rests squarely upon the Constitution and laws of the United States and presents, in the language of Mr. Justice Sutherland in his memorandum appended to his order allowing our appeal, a "novel and important" question on the merits. We shall undertake a little later to show that more than one novel and important Federal question is presented by our appeal.

In another particular our case is to be sharply distinguished from *Coale* v. *Pearson*. In that case counsel for the appellees, the University of Maryland and its president and regents, in their brief in opposition to the motion to dismiss the appeal, stated in substance that the only ques-

tion of importance presented by the appeal was as to the correctness or incorrectness of the Maryland Court's construction of the Maryland statute requiring compulsory military training. And of course this Court has held many times that it is bound by the construction of State statutes by the highest court of the State.

Also, in the Maryland case, counsel for appellants specifically stated in their brief in opposition to the motion to dismiss that they had not and did not claim any abridgment of the privileges and immunities of their student clients as citizens of the United States. On behalf of our appellants we do most earnestly contend that their suspension from their State University for their refusal to submit to enforced membership and service in the Reserve Officers' Training Corps, which is distinctly a branch of the Federal Military Establishment, and maintained for Federal purposes, constitutes an abridgment of their privileges and immunities as citizens of the United States in violation of the 14th Amendment.

The California Statutes.

As pointed out in the assignment of errors, and in our statement as to Jurisdiction, it is our contention that in this case in the California court the validity of three statutes of California was drawn into question and that the decision of the Supreme Court of California sustained the validity of each of those statutes. The court below in its opinion specifically sustains the validity of two of those statutes and inferentially sustains the third.

In paragraph (1) the court said:

> "The constitution of the State of California (Art. IX, Sec. 9) reposes in the Regents of the University of California, full powers of organization and government of the University, subject only to such legisla-

> tive control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds."

Our contention in the court below was and here is that that section of the California Constitution as applied to sustain the suspension of the student appellants herein violated their rights under the due process clause and the privileges and immunities' clause of the 14th Amendment, and under the Treaty of the United States known as the Kellogg Pact of 1928, and under Clause 2 of Article VI of the Constitution of the United States, which reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

We also contended, and here contend, that the Organic Act creating the University (Stats. 1868, p. 248,, Sec. 6), as applied to sustain the suspension of our student appellants for their refusal to participate in enforced military training violated their rights under the 14th Amendment.

And, third, we contended below and here contend that the rule or resolution of the Regents of the University requiring compulsory training, as here applied to sustain the suspension of appellants violates their rights under the 14th Amendment, the Kellogg Pact, and Clause 2 of Section VI of the Constitution. All those contentions upon Federal constitutional grounds the court below swept aside with the single sentence: "We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States".

Having in mind that it is this general rule of the Regents requiring compulsory military training that constitutes a statute, the validity of which is drawn into question, within the meaning of the cases in this Court, it seems clear that the validity of that statute as well as of the Statute of 1868 known as the Organic Act of the University, and Section 9 of Article IX of the California Constitution is drawn into question by this appeal.

It seems appropriate to consider together the Statute of 1868 and the constitutional section. In the court below we quoted the language of the Organic Act providing that every resident in the State of California of the age of 14 years or upwards shall have the right to attend the University. We realize that it may be held that that statute has been superseded by Section 9 of Article IX of the Constitution which reposes in the Regents of the University of California full powers of organization and government of the University, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. That language would seem clearly to take from the Legislature the power which it had been given under the Organic Act to manage and conduct the University. We do not rely upon that statute as supporting the right of our student appellants to attend the University. We do not argue at this point that the right to education in the State University is a right under the Constitution and Laws of the United States. Our contention is, and we shall argue a little later on, that the State of California, acting through the Regents of the University may not validly impose as a condition upon which the privilege of education will be accorded, the surrender of rights and privileges and immunities which belong to appellants as citizens of the United States by virtue of the Constitution and Laws of the United States.

We shall contend also that the suspension of the student appellants from the University for their refusal to surrender their deepest convictions of conscience and religion constitutes a deprivation of religious liberty as guaranteed by the 1st Amendment against abridgment by Congress, and as protected against restriction by the States by the due process clause of the 14th Amendment. And we shall contend further that compulsory military training in a State university is violative of the spirit, if not the letter, of the Treaty of the Unted States known as the Kellogg Pact of 1928.

Compulsory membership and service in the Reserve Officers Training Corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the 14th Amendment.

Stated most concisely, our contentions on this point are as follows:

(a) The Reserve Officers Training Corps is a branch of the Federal military service, maintained for Federal purposes.

(b) Without authorization by Act of Congress there is no power in the Federal Government (much less the State) to compel service in any branch of the Federal military establishment in time of peace.

(c) This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (14th Amendment.)

(e) If it is said that the privileges and immunities of appellants are not abridged because they are not actually be-

ing compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and

(f) No State may impose, as a condition upon which it will extend a privilege which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States.

Taking up the foregoing six propositions *seriatim:*

(a) The Reserve Officers Training Corps is an integral part of the military forces of the United States. It is set up by Act of Congress: U. S. C. A. Title 10 Army; Chapter 20, Reserve Forces; Section 381 Establishment of Reserve Officers Training Corps. The R. O. T. C., is no part of the military establishment of the State of California. It is not mentioned in the new Military Code of California, approved and published in June, 1933. The organization's membership, control, courses of study etc., are under the direction and control of the War Department. The commanding officers, the uniforms, the weapons are supplied by the Federal Government. And, as stated in the University's Bulletin for the information of students, the primary object of establishing units of the R. O. T. C. at the University is to qualify students for appointments in the Reserve Officers Corps of the United States Army (R. 2). That statement of fact is made, in the petition for mandate in the court below, and never has been disputed. Thus it is clear not only that the R. O. T. C. is distinctly Federal in its nature and set-up, but also that it exists for Federal purposes. If the R. O. T. C. were a part of the State military establishment, or if military training at the University were in the University Cadets, as it was prior to the establishment of the R. O. T. C. at the University of California, our case would be materially different. There

we would have the question of the right of the State to compel military training, and service in the University's military units, for state purposes, and not for a Federal purpose. It is not necessary for us here to contend that compulsory training in such a State military unit, for State purposes, would constitute an abridgment of the privileges and immunities of citizens of the United States.

On the other hand, our problem here is clearly Federal. It is as citizens of the United States, not as citizens or residents of California, that appellants are required to accept compulsory military training. The Regents of the University of California require enrollment and participation in the military training courses for at least two academic years *of all able-bodied male students who are citizens of the United States* (R. 2).

(b) Without authorization by act of Congress there is no power even in the Federal Government to compel service in any branch of the Federal military establishment in time of peace. Even in war time, specific acts of Congress are required to enable the conscription of men for military service. The selective service Act of the World War was passed to meet that need. It is true that every citizen is bound to render military service to his country when called upon to do so. (Act April 22, 1898, 30 U. S. Stat. at L. 361, c. 187, Sec. 1.) But, as said in 5 *Corpus Juris*, at page 297, citing *In re Riley*, 20 F. Cas. No. 11834; 1 Ben. 408, 39 How. Pr. (N. Y.) 188;

> "The army is recruited in times of peace, and, except when conscription becomes necessary, in times of war also, by voluntary enlistment. The enlistment of soldiers in the army of the United States, as an incident to the power to raise armies, is wholly within the regulation and control of Congress."

And of course it is common knowledge that all enlistments, in time of peace, in the Army and Naval Academies,

are voluntary. The R. O. T. C. is another Federal institution for the training of citizens to be officers in the Army.

Possibly, on the authority of *United States* v. *MacIntosh, supra,* this Court would hold that Congress has power to make military training compulsory in the R. O. T. C. and in the Army and Naval Academies. But Congress has not done so. The University of California is a Land Grant college, enjoying Federal subsidy under the Morrill Land Grant College Act approved July 2, 1862. Undoubtedly many such institutions have made military training compulsory in the sincere belief that the Morrill Act required that it be compulsory. It does not. It requires that

> "income from (proceeds of lands ceded by the Federal Government to the States) shall be inviolably appropriated to the endowment, support and maintenance of at least one College of Agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and mechanic arts".

In construing that requirement, it would be just as reasonable to hold that courses in agriculture, or in classical studies, or in mechanic arts, are required to be made compulsory, as that courses in military tactics are required by the Morrill Act to be made compulsory.

The situation reduces itself to the absurd when we suggest that all the subjects named above, and required to be taught, are intended to be compulsorily required. The very apparent purpose of Congress in enacting the statute is to assist education, in the states, of students seeking training in any of those sharply differing professions.

So far as we know, this Court has never passed upon the question we are now discussing. Twice, however, the Attorney General of the United States, in 1923 and in 1930,

has rendered his opinion to the Secretary of the Interior that there is no requirement in the Morrill Act that military training shall be compulsory in the Land Grant colleges (See 36 Opinions of Attorney General 297).

And, since Congress has not required that military training in that branch of the Federal military establishment known as the Reserve Officers Training Corps shall be compulsory, certainly the States and the Universities are without power to compel service in that military organization, not of the state but of the Federal Government.

(c) It would seem to require no argument to support our deductions from the foregoing points (a) and (b) that this freedom from compulsory service in a branch of the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States. Clearly it is not a privilege or immunity which appellants enjoy as citizens of California. California could not force men into the Federal military. Congress can and does, in time of war, but has not done so in time of peace. We are familiar with the cases holding that the privileges and immunities clause of the 14th Amendment protects only those privileges and immunities which citizens of the United States enjoy as such, as distinguished from others which accrue to citizens of the States as such. The immunity which we are here discussing has, and can have, no relationship to State citizenship. The State has nothing to do with raising, equipping, manning, training and supporting units of the Federal miltary establishment. The State could not grant immunity to its citizens for peace-time or war-time service in the Federal military forces.

That immunity exists by virtue of the fact that Congress, which alone has the power, has refrained from requiring enforced service.

The exclusiveness of the Federal government's control of all matters having to do with the Nation's military forces is strikingly manifested in the Selective Draft Cases (*Arver* v. *U. S.*, 62 L. Ed. 349, 354, 245 U. S. 363, 381) wherein it is said:

> "When the constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since, besides the delegation to Congress of authority to raise armies, the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Art. I, Sec. 10."

At P. 389 (245 U. S.) Mr. Chief Justice White says:

> "In reviewing the subject we have hitherto considered it as has been argued from the point of view of the Constitution as it stood prior to the adoption of the 14th Amd. But, to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past, *how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating, as it does upon all the powers conferred by the Constitution,* leaves no possible support for the contentions made, if their want or merit was otherwise not so clearly made manifest."

The privileges and immunities guaranteed against state abridgment by the 14th Amendment are those arising out of the essential nature and character of the National

Government, and granted or secured by the Constitution of the United States (*U. S.* v. *Cruikshank,* 92 U. S. 542).

Clearly the immunity from enforced service in a branch of the Federal military establishment in time of peace arises "out of the essential nature and character of the National Government", and is "secured by the Constitution of the United States", which proclaims as the Supreme law of the land the Constitution itself and the laws of the United States made in pursuance thereof (Art. VI, Clause 2). The Morrill Act, *supra,* is the specific law "made in pursuance thereof", and it affords the immunity from enforced service in time of peace by not making military training in the land grant colleges compulsory. Similarly the act establishing the R. O. T. C., cited above, refrains from making training compulsory and from authorizing it to be made compulsory in the land grant colleges and other state educational institutions. It does, however, authorize the requirement of compulsory military training in other institutions wherein R. O. T. C. units are established, thus bringing into relief the intention of Congress not to authorize compulsion in the State colleges.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States (14th Amendment). Even so enthusiastic an admirer of the Constitution as the present writer recognizes that the 14th Amendment requires no argument of his own to support it. So we add nothing to it.

(e) If it is said that the privileges and immunities of appellants are not abridged because they are not actually being compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and no state may impose, as a condition upon which it will extend a privilege

which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States.

We rest our argument on this point upon a line of decisions of this Court beginning with *Home Ins. Co. of N. Y.* v. *Morse,* 20 Wall. 445, 456, in which it was held that, although the power of a State is unquestioned to fix the terms upon which foreign corporations may do business within the State, the one condition which it may not impose is the surrender of the right under the Constitution and laws of the United States to transfer causes from the State to the Federal Courts upon the ground of diversity of citizenship. Without taking the time and space to quote from the opinion at length, we respectfully refer the court to that case. The facts were, briefly, these: A Wisconsin statute required foreign insurance corporations to sign an agreement that if sued in the State Courts they would not assert their right of transfer to the Federal Courts. The Home Ins. Co. signed such an agreement. Later it was sued in the Wisconsin Courts, and demanded that the case be transferred. The demand was rejected, and judgment went against the foreign corporation. On appeal to this Court, the judgment was reversed and the case sent back for transfer to the Federal Court and for trial there. The underlying principle involved of course was not the right of foreign corporations to have their cases transferred to the Federal Courts, but the supremacy of the Federal Constitution and laws in the field occupied by them, over the constitutions and laws of the States.

The permanency and finality of the ruling in the Wisconsin case is stressed by this Court in *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 66 L. Ed. 352. In a brief opinion Mr. Chief Justice Taft resolves a conflict in earlier

cases, and re-states the law establishing the supremacy of Federal Constitutional rights. We quote briefly—

> "The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. *It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts* in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the *sovereign power of a state* in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, must be considered as overruled, and that the views of the minority judges in those cases have become the law of this Court. The appellant in proposing to comply with the statute in question and revoke the license, was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is affirmed."

Now, applying the Constitutional principle expounded by Mr. Chief Justice Taft to the present case, we submit that, although the power of the Regents of the University of California to govern the University is unquestioned, including the power to fix the terms upon which students may be admitted, and prescribe the courses which must be taken, and to suspend students who decline to comply with the regulations, there is one condition which the Regents may not impose as a price for education, namely, the surrender of a right under the Constitution and laws of the United States belonging to our student appellants

as citizens of the United States. And we submit that *Terral* v. *Burke, supra,* sustains us in that contention.

Compulsory military training imposed upon religious and conscientious objectors violates religious freedom, and deprives appellants of their freedom of religion without due process of law.

Upon this point our task, as we see it, is to demonstrate that the principle of freedom of religion is legitimately and necessarily involved in this case. We contend that it is. If we are right in that, our way is clear from that point on. For just as freedom of speech as guaranteed by the 1st Amendment is protected against State abridgment by the due process clause of the 14th Amendment, as decided in *Stromberg* v. *California, supra;* and as freedom of the press is thus protected as decided in *Near* v. *Minnesota, supra,* so must freedom of religion, also guaranteed by the 1st Amendment, be protected from State aggression by the 14th Amendment. The principle is identical in all three instances.

Authoritative decisions of this Court on freedom of religion are not as numerous as we might hope, for the reason that all or practically all such decisions antedate *Stromberg* v. *California, supra,* and *Near* v. *Minnesota, supra.* The older cases held that the guaranties of civil liberties in the 1st Amendment afforded no protection against abridgment by the States, since the Amendment forbade only Congress to abridge those liberties. All that is changed by the *Stromberg* and *Near* decisions, which remove all doubt that the liberties guaranteed by the 1st Amendment, are a part of the liberty of which the 14th Amendment provides that no State shall deprive any person without due process of law.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1st Amendment.

We contend that depriving students of their right to education at their State University because of their refusal to engage in military training in violation of the religious teachings of their Church and their own deepest convictions of religion and conscience, amounts to a prohibition of the free exercise of religion, in violation of the 1st Amendment as more applicable to the States by the 14th Amendment. Certainly freedom of religion means something more than the right to worship according to the dictates of one's own conscience. No law or Constitutional guaranty is necessary to protect that right. The principle must afford protection to outward manifestations of religious belief. This Court has sustained such manifestations in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535, which cases we respectfully call to the Court's attention.

And in California we find one of the strongest cases in defense of religious freedom in *Hardwich* v. *Board of School Trustees,* 54 Cal. App. 696, holding that the suspension of children from a public school for their refusal, upon religious and conscientious grounds, to participate in training in dancing was a violation of religious freedom as guaranteed by the Federal and State Constitutions. The Supreme Court of California, in a brief opinion, affirmed the decision of the District Court of Appeal.

We respectfully submit that freedom of religion is necessarily involved, and that under the authority of the cases cited, that principle is entitled to protection against State aggression by the 14th Amendment.

Compulsory Military Training Violates the Kellogg Pact, Outlawing War.

The United States led more than 50 nations in the treaty by which they solemnly declared they would never resort to other than pacific means in the settlement of international differences. California, and the University of California, are bound by that treaty. The Federal Government, perhaps, may violate it. The States may not. We submit that compulsory training for war violates the spirit, if not the letter, of the Kellogg pact.

In conclusion, we submit that the judgment of the Supreme Court of California, denying relief to appellants, should be reversed, and that a writ of mandate should issue out of, or at the direction of this Court, requiring the reinstatement of Albert W. Hamilton and W. Alonzo Reynolds, Jr., as students at the University of California at Los Angeles.

Respectfully submitted,

JOHN BEARDSLEY,
Attorney for Appellants.